

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION**

KHALID SHAMSUD'DIYN,

Plaintiff,

vs.

UNITED STATES,

Defendant.

Civil Action No. AW-00-1893

MEMORANDUM OPINION

Currently pending before the Court is Defendant's Motion to Dismiss [11-1], or in the alternative, for Summary Judgment [11-2]. Despite an extension granted to Plaintiff to respond, no opposition has been filed. No hearing is deemed necessary. See Local Rule 105.6. Upon consideration of the arguments made in support of, and opposition to, the respective motions, the Court shall grant Defendant's Motion to Dismiss as the Court lacks subject matter jurisdiction.

I. FACTUAL BACKGROUND¹

Plaintiff, Khalid Shamsud'diyn, committed a number of crimes that resulted in multiple arrests by state police in Maryland and by federal authorities in the District of Columbia. Plaintiff's cross-jurisdictional activities resulted in several transfers in custody between the state and federal authorities. His state sentence was to be served concurrently with his federal sentence. On August 20, 1990, Petitioner was

¹A more detailed account of the factual and procedural history of Plaintiff's dispute with the BOP can be found in Shamsud'Diyn v. Story, 142 F.3d 440 available at 1998 WL 122155 (7th Cir. Mar 12, 1998) (NO. 96-1686) (unpublished decision).

taken into federal custody. Thereafter, the Federal Bureau of Prisons (BOP) calculated Plaintiff's sentence without giving him credit for certain times that he was in custody.

Plaintiff alleges that the BO negligently calculated his release date, leading to him being held 671 days beyond his proper released date on April 13, 1996. The United States seeks dismissal on a number of grounds, including expiration of the statute of limitations, application of principles of *res judicata*, and failure to state claim upon which relief can be granted.

II. DISCUSSION

A. Legal Standard

It is well established that a motion to dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure should be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The function of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint, and not the facts that support it. See Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). In determining whether to dismiss the complaint, this Court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true. See Chisolm v. TranSouth Financial Corp., 95 F.3d 331, 334 (4th Cir. 1996).

B. Statute of Limitations

Plaintiffs' complaint states that his proper release date was April 16, 1996. Yet, he did not file his Federal Tort Claims Act (FTCA) claim with the Regional Counsel for the North Carolina until July 9, 1999. Plaintiff maintains that his complaint is timely because his claim was filed with the appropriate administrative agency within two years of his actual release date, July 9, 1997.

“It is well established that the United States Government, as sovereign, is immune from suit unless it consents to be sued.” Gould v. U.S. Dept. of Health & Human Services, 905 F.2d 738, 741 (4th Cir. 1990). The FTCA provides a limited waiver of the United States’ sovereign immunity, subject to certain terms and conditions prescribed by Congress. Id. “A key jurisdictional prerequisite to filing suit under the FTCA involves the presentation of an administrative claim to the government within two years of the incident.” Kokotis v. U.S. Postal Service, 223 F.3d 275, 278 (4th Cir. 2000). Subsection (b) of 28 U.S.C.A. § 2401 provides:

(b) a [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). “Although FTCA liability is determined ‘in accordance with the law of the place where the act or omission occurred,’ federal law determines when a claim accrues.” Gould, 905 F.2d at 742 (quoting 28 U.S.C. § 1346(b)). Here, the question centers on when did Plaintiff know or, in the exercise of due diligence, should have known both the existence and the cause of his alleged injury. See United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). “Once the plaintiff is in possession of these critical facts, his cause of action accrues, and [the plaintiff has] two years from that point to develop and present the claim to the appropriate federal agency.” Muth v. United States, 1 F.3d 246 (4th Cir. 1993). Nevertheless, some courts have applied a continuing tort theory to mitigate the rigid application of the Kubrick rule. Miller v. United States, 932 F.2d 301, 304 (4th Cir.1991); Wehrman v. United States, 830 F.2d 1480, 1486 (8th Cir.1987); Page v. United States, 729 F.2d 818, 821-22 (D.C.Cir.1984); Hurt v. United States, 914 F.Supp. 1346 (S.D. W.Va. 1996). “When a tort involves

continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases.” Page, 729 F.2d at 821. Nevertheless, “[a] continuing tort sufficient to toll the statute of limitations is occasioned by continual unlawful acts, not by continuing ill effects from an original tort.” Maslauskas v. United States, 583 F.Supp. 349, 351 (D. Mass. 1984). Even assuming the truth of the allegations in the complaint, the alleged tortious conduct was the miscalculation of Plaintiff’s prison sentence. Plaintiff’s incarceration was continuing ill effect of the alleged miscalculation. Id.; cf. Nat’l Advertising Co. v. Ralieggh, 947 F.2d 1158 (4th Cir. 1991); Lynch v. Army Corps of Engineers, 474 F.Supp. 545 (D. Md. 1978). Accordingly, Plaintiff’s actual release date is not the appropriate starting date for accrual of the statute of limitations. Rather, Plaintiff knew the existence and cause of his alleged injury on the date he maintains was his proper release date, April 13, 1996. At that time, Plaintiff was aware of his alleged unlawful confinement and he knew that the BOP officials’ calculation of his federal sentence caused the alleged delay in his release. On the face of the complaint, Plaintiff acknowledges that his claim was not filed until July 9, 1999 which it not within the two-year limitations period. As the claim was not filed before expiration of the statute of limitations, the Court finds that Plaintiff has not satisfied the jurisdictional prerequisites of the FTCA and his complaint must be dismissed.

III. CONCLUSION

For the reasons stated above, the Court will grant Defendant’s Motion to Dismiss [11-1] and deny as moot Defendant’s Motion for Summary Judgment [11-2]. An Order consistent with this Opinion will follow.

Date

Alexander Williams, Jr.
United States District Judge

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ORDER

For the reasons stated in the accompanying Memorandum Opinion dated April 6, 2001, IT IS this 6th
_ day of April, 2001 by the United States District Court for the District of Maryland, hereby **ORDERED**:

1. That Defendant's Motion to Dismiss [11-1] BE, and the same hereby IS, **GRANTED**;
2. That Defendant's Motion for Summary Judgment [11-2] BE, and the same hereby IS, **DENIED**
AS MOOT;
3. That the above captioned case BE, and the same hereby IS, **CLOSED**; and
4. That the Clerk of the Court mail copies of this order to all counsel of record.

Alexander Williams, Jr.
United States District Judge